Nos. 18510 to 18519, 18521 to 18531, and 18533

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.*; UNITED AIR LINES, INC.,

Appellees.

BRIEF OF APPELLEE UNITED AIR LINES, INC.

(On Government's Appeals).

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Regulations

Statutes Page

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Preliminary Statement.

United States of America, hereinafter designated "Government," appeals in the 22 nongovernment employee cases,* from the judgments against it in favor of the several plaintiffs and from the judgments in said causes awarding contribution from it in favor of this appellee, hereinafter designated "United." United is interested in upholding the latter judgments *as far as they go;* for United, on its own appeal urges that it should have been awarded indemnity, which is to say *total* contribution, from the Government rather

*For details as to the parties and amounts of recovery in each of these cases, see Appendix to Opening Brief of Appellant United Air Lines, Inc., Part I, and particularly pages 12 and 13 of said Appendix and Part.

than the partial contribution awards in its favor which the Government here seeks to overturn.

The Government specifies 7 assignments of error. Three of them concern asserted exemption from the Federal Tort Claims Act, cf. 28 U.S.C. § 1346(b), specifications I and III claiming exemption by virtue of the "discretionary function" exception found in 28 U.S.C. § 2680(a), while specification IV asserts lack of jurisdiction under the so-called "misrepresentation" exemption found in 28 U.S.C. § 2680(h). Three of the specifications (II, V and VI) attack the District Court's findings of negligence in various particulars, and the remaining specification (VII) asserts error in the limitation imposed by the District Court upon the amounts of contribution in favor of the Government from United in two of the cases. We shall treat of these matters in the order in which we have mentioned them above, commencing with the specification dealing with the discretionary function exception, a subject upon which the Government lays its greatest stress.

Jurisdiction — Facts.

This appellee has no quarrel with either the Government's jurisdictional statement or its statement as to the facts. Its reply to the questions presented by the Government follows, in summary and in detail.

Summary of the Argument.

The subject of the Government's asserted immunity under the discretionary function exception to the Tort Claims Act is first taken up. It is pointed out that in all such situations it is necessary to draw a line of demarcation between Government activities at a level of

policy determination, of planning or of discretionary decision, on the one hand, and acts or omissions by subordinates, agents and employees below that level in carrying out, at the operational level, the decided policy or plan or order. Such latter acts or omissions, typified here by those of the jet pilots and the control personnel, are not within the discretionary function exception and are subject to the ordinary standards of reasonable care.

It is next pointed out that the Nellis Command was within the discretionary function exception only as to matters calling for and evincing a proper exercise of discretion; that the Command had no discretion either to disregard orders or to execute, at the operational level, orders rendered at a decisional level in a reckless, careless or negligent manner, the latter once again typified here by the acts and omissions particularly of the Government pilots and its control personnel at Nellis.

Next there is discussed the failure of the Nellis Command, contrary to orders from above, to schedule their VFR flight operations in a manner so as to minimize congestion and potential air hazards; and it is shown that, contrary to the Government's contentions, the Air Force upper echelon *was* concerned, per its AFR (Air Force Regulations) 55-19 and 55-19A, with potential hazards from civilian air traffic. So, also, it is pointed out that in derogation of orders from above, the Nellis Command did not make maximum use of outlying facilities in order to relieve traffic congestion and to minimize potential collision hazards; among other things, it reserved the area immediately adjacent to Nellis Air Force Base for instrument flying.

It is also shown that, at the operational level, the Nellis control personnel and the pilots of the Government jets neither gave nor sought traffic information as regards flights along Victor 8 airway, which information was readily available; and that these omissions were in direct violation of AFR 55-19.

It is next pointed out that the CAA and its operational personnel were not within the discretionary function exception as regards their negligent failure, although clearing the United Flight 736 for passage along Victor 8, to warn of the utilization of the semi-blindfolded KRAM penetration procedure in the vicinity of Nellis; which procedure was known to the CAA, but not to United, as the District Court found. Authorities are then cited as to the duty to warn third persons of danger known to the Government, which authorities are spearheaded by *Indian Towing Co. v. United States,* 350 U.S. 61.

There is next discussed the proposition that the so-called "misrepresentation" exception to the Tort Claims Act has no application to the present situation; rather, the situation presented involved a negligent breach of the duty to warn which has just been mentioned above.

It is next pointed out that under the evidence the District Court properly held the Government guilty of at least active and proximately causative negligence, including the establishment and use of the KRAM procedure, culminating in the failure of the Government pilots to see and avoid, and to yield the right of way to, the DC-7. In this connection it is further pointed out that both as per stipulation at the trial and as a

matter of law the jet pilots were subject to the Civil Air Regulations (CAR) and that their acts and omissions at and immediately prior to the collision constituted negligence per se in that the evidence fully supports the District Court's findings of negligence in particulars specifically covered by those regulations.

Discussion is then had as to the right of the District Court reasonably to infer negligence from the fact that the speed brakes of the jet were found in a retracted position after the collision and resulting crash.

Lastly it is pointed out that the Government has failed to show error in the District Court's allowance of contribution to it from United in amounts not in excess of the verdicts against United in specified instances, it being shown that in fact the Government received more favorable treatment in this regard than it was entitled to under any valid concept of the law relating to contribution.

The overall conclusion is that the Government has failed to show error in any particular material to its rights.

ARGUMENT.

I.

THE DISTRICT COURT PROPERLY HELD THAT THE GOVERNMENT WAS NOT SHIELDED BY THE DISCRETIONARY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT.

The discretionary function exception to the waiver of sovereign immunity provided in the Federal Tort Claims Act, cf. 28 U.S.C. § 1346(b), is set forth in Section 2680(a) of such Title 28. It is as follows:

> "The provisions of this chapter and Section 1346(b) of this Title shall not apply to . . . any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. § 2680(a).)

The District Court disposed of the Government's claims in this regard by its Finding as follows, which paralleled its Conclusion of Law VI:

> "81. Each of the negligent acts and omissions on the part of defendant United States of America set forth in these Findings falls within the ambit of the Federal Tort Claims Act as amended and outside of the 'discretionary function' exception as set forth therein." (Government's Opening Brief, Appendix A, p. 26.)

The full force of the Government's attack under the present head is thus leveled at the foregoing finding. If Finding 81 is not, as we propose to show, clearly erroneous or erroneous at all, the Government's attack

upon the other findings mentioned by it in this connection (26-30, 47-56, 60-61, 66-69) falls of its own weight insofar as its argument with reference to the discretionary function exception is concerned. Moreover, since the Government makes no attack under any head upon Finding 85, which characterizes the various acts of negligence on the part of the Government as being *active* in nature, there will be no necessity here* for United to discuss this subject as bearing upon the right of the latter to indemnity from the Government.

The argument of the Government in pursuance of its invocation of the discretionary function exception is in the main *ad hominem,* coupled with casual references to the opinion in *Dalehite v. United States,* 346 U.S. 15 and to the opinion of this Court in *Builders Corporation of America v. United States,* 320 F.2d 425. To say that the Government's argument proves too much is putting it mildly: The unspoken thesis of the argument is that the discretionary function exception has wholly swallowed up the waiver of sovereign immunity in tort cases which it was the purpose of Congress, per the Federal Tort Claims Act, to grant.

As will be seen from the cases which follow, the problem, in any case involving federal tort liability under the statute where, as here, the claim is challenged by the asserted applicability of the discretionary func-

*It will be recalled that in its opening brief on its own appeal (pp. 22-37) United points out that the acts and omissions proved and found as against the Government constituted not only active negligence, but reckless or wilful misconduct. It is not necessary, however, to go into this question in this present brief, since the Government's appeal will fail in any event upon the upholding of any one or more of the findings of active and proximately causative negligence which the District Court did make.

tion exception, is one of drawing a line of demarcation. On the one hand, executive activities at a level of policy determination, of planning or of discretionary decision are within the discretionary exception. No one disputes this. On the other hand, acts or omissions by subordinates, agents or employees below that level in carrying out, at the operational level, the decided policy or plan or order are subject to the ordinary standard of reasonable care.

Even the *Dalehite* case,* which is the most liberal holding in the direction of exculpating the Government under the discretionary exception, recognizes that such exception does not extend to common law torts such as that involved here. Bearing in mind that what we are here dealing with is a charge of negligence in and ante-

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**Dalehite v. United States, supra,* 346 U.S. 15, arose out of the Texas City explosion disaster of 1947. It was a 4-3 decision, the minority being Mr. Justice Jackson, Mr. Justice Frankfurter, who subsequently authored the opinion in *Indian Towing Co. v. United States,* 350 U.S. 61 and Mr. Justice Black, who wrote the opinion in *Rayonier v. United States,* 352 U.S. 315. The combined effect of these cases, together with *Hatahly v. United States,* 351 U.S. 173, authored by Mr. Justice Clark, is to overrule *sub silentio* the holding in *Dalehite* to the effect that the discretionary function extended to such operational activities below the decisional level as the maintenance of proper temperatures of the subject fertilizer material, the use of unsafe bagging materials and negligent supervision of storage and loading; while *Indian Towing* and *Rayonier,* the latter by express reference, overruled the *Dalehite* exculpation of the Government for negligence in fire prevention on the basis, expressed in *Dalehite,* of an assumed analogy to the governmental-proprietary dichotomy in the field of municipal law. As was said in *Fair v. United States,* 5 Cir., 234 F.2d 288:

> "It is further worthy of note that the minority in Dalehite, whose dissent was indicative of the desire to give broad extension to the Tort Claims Act, had become the majority in Indian Towing Co. A reading of the opinions and the dissents in the two cases leads to the conclusion that Indian Towing Co. represents a definite change in attitude on the part of the Supreme Court." (234 F.2d at 292.)

cedent to the operation of two colliding vehicles—airplanes, but vehicles nevertheless—*Dalehite* had this to say as regards the waiver of immunity manifested by the Tort Claims Act (footnote references are omitted):

> ". . . Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.' . . ." (346 U.S. at 28.)

And further on the Court observed:

> "So we know that the draftsmen did not intend it to relieve the Government from liability for such common-law torts as an automobile collision caused by the negligence of an employee, see p. 28, *supra,* of the administrative agency. . . ." (346 U.S. at p. 34.)

Cases illustrating where the line should be drawn so as not unreasonably to "import immunity back into a statute designed to limit it," as Mr. Justice Frankfurter put it in the *Indian Towing* opinion (350 U.S. at 69), are the following:

Indian Towing Co. v. United States, 350 U.S. 61. The holding in that case is sufficiently epitomized by the following quotation therefrom:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working

> order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." (350 U.S. at 69.)

Thus, the decision as to whether and where to locate a lighthouse is discretionary. Thereafter its maintenance and operation is to be governed by the standard of reasonable care. So, also, it is worthy of note in comparison with the operational activities of the CAA in the instant case that the *Indian Towing* opinion also held that "it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'Good Samaritan' task in a careful manner." (350 U.S. at 64-65.)

Hatahly v. United States, 351 U.S. 173. The action of federal agents in confiscating and destroying horses belonging to Indians living within the area constituted a wrongful trespass not within the discretionary function exception. It is to be noted that *Hatahly* dealt with a wilful, not a negligent, tort; a tort comparable for this reason with the charge here against the Government by United of wilful or reckless misconduct.

Rayonier, Inc. v. United States, 352 U.S. 315. The Government was held liable for negligence of its employees in allowing a forest fire to be started on government land and in failing to use due care to put it out. As to this element, the case overruled *Dalehite v. United States, supra,* 346 U.S. 15, on the authority

of *Indian Towing Co. v. United States, supra,* 350 U.S. 61.

The Circuits also reflect awareness of the distinction between the policy, planning or decisional level (discretionary) and the operational level (actionable under the Act in the absence of due care). Thus:

Costly v. United States, 5 Cir., 181 F. 2d 723. The Tort Claims Act applies in case of negligent administration of wrong substance for anaesthetical purposes, although original decision to admit patient was discretionary in nature. To same effect, see *United States v. Gray,* 10 Cir., 199 F.2d 239.

Somerset Food Co. v. United States, 4 Cir., 193 F.2d 631. Negligence of Government in marking wrecked ship actionable under the Act. Alternate grounds for holding discretionary exception inapplicable were (1) duty to mark ship not discretionary but *mandatory* under Wrecked Ship Acts, or (2) in any event there was no discretion to mark so as to make the wreck a trap for the unwary rather than to give warning.

United States v. White, 9 Cir., 211 F.2d 79. Negligent failure to warn business invitee of danger from explosive duds held to be actionable under the Act.

United States v. Lawter, 5 Cir., 219 F.2d 559. Held not within discretionary exception: negligence of inexperienced helicopter operator, an experienced oprator being present, in causing decedent to fall to her death while attempting to hoist her to safety.

United States (Eastern Air Lines) v. Union Trust Co., D.C.Cir., 221 F.2d 62. Discretionary ex-

ception no defense to wrongful death action for negligence of operators of Government owned and operated control tower in clearing two airplanes to land on same runway at same time, with resultant deaths of all passengers on Eastern Air Lines plane. *Judgment against Government affirmed, 350 U.S. 907, on authority of Indian Towing Co. v. United States, supra, 350 U.S. 61.*

Air Transport Associates v. United States, 9 Cir., 221 F.2d 467. Contract re use of airfield held void as to provision purporting to exculpate Government for negligence and judgment in favor of Government in action brought under Act for negligence of control tower operator in clearing plane for landing at night on impeded runway reversed with directions to enter judgment for plaintiff.

Dahlstrom v. United States, 8 Cir., 228 F.2d 89. Recovery allowed under Act for negligent low flying of CAA owned and operated airplane, causing injury to plaintiff by runaway horses frightened by plane.

Fair v. United States, 5 Cir., 234 F.2d 288. Held error to dismiss complaint charging that *after* Air Force officer had been released by military hospital staff (discretionary), such officer shot and killed three persons after making threats known to Air Force physicians and to Provost Marshall who had promised to give notice of impending release but had failed to do so.

American Exchange Bank v. United States, 7 Cir., 257 F.2d 938. Discretionary exception held to be no defense to action for negligent failure to install handrails at entrance to United States Post Office.

United States v. De Vane, 5 Cir., 306 F.2d 182. Negligent misinterpretation of message by Coast Guard leading to premature abandonment of rescue search held actionable under Act if, under "Good Samaritan" doctrine decedent's condition had worsened as a result of the Coast Guard's negligence, and the cause was remanded to permit of the determination of that issue.

United States v. Hunsucker, 9 Cir., 314 F.2d 98. Held that Government was not immune from liability for its failure to take reasonable precautions to prevent damage to appellee's land; the damage resulting from the negligent construction of drainage and sewage systems by a military command which, without any specific instructions in that behalf, had been ordered to reactivate an air base.

At page 26 of its opening brief herein, the Government cites *Builders Corporation of America v. United States,* 9 Cir., 320 F.2d 425 (for opinion on prior appeal, see 259 F.2d 766). This case holds that, under the facts there present, where plaintiffs were seeking to recover for having spent moneys in reliance upon certain communications between the Commanding General of the Sixth Army and the Commanding Officer of the Sierra Ordnance Depot, the subject matter of such communications fell within the area of discretion of the latter officer. The examples given concerned the duty of the Ordnance Depot Commander to report certain facts to his superior and his duty to arrange for certain tours of activity on the part of subordinate personnel. The case would seem, with all respect, to be of little relevance here, where we are dealing with negligence and proximate causation culminating in a vehicular collision, clearly at the operational level under the authorities already cited.

A. The Operators of the Government Plane Were Not Within the Discretionary Function Exception.

This proposition is implicit in every case which we have cited above. Clearly the unfortunate pilots, instructor and student, were at the ultimate of operational levels, precisely as the driver of an automobile would have been in any automobile collision. See, *inter alia, Dahlstrom v. United States, supra,* 228 F.2d 819 (CAA pilot); *United States v. Lawter, supra,* 219 F.2d 559 (helicopter pilot).

B. The Nellis VFR Control Personnel Were Not Within the Discretionary Function Exception.

This proposition is also demonstrable per reported decisions dealing with control tower operators.* *United States (Eastern Air Lines) v. Union Trust Co., supra,* D.C. Cir., 221 F.2d 62, aff'd as to Government 350 U.S. 907; cf. *Air Tranport Associates v. United States, supra,* 9 Cir., 221 F.2d 467.

C. The Nellis Command Was Within the Discretionary Function Exception Only as to Matters Calling for and Evincing a Proper Exercise of Discretion. There Was No Discretion Vested in the Command Either to Disregard Orders or to Execute, at the Operational Level, Orders Rendered at a Decisional Level in a Reckless, Careless or Negligent Manner.

By the term Nellis Command we connote, as does the Government, the Commanding General at Nellis Air Force Base and those of his subordinates who

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*This by apt analogy. Nellis VFR Control was a radio communication facility exercising control functions. (See Findings 21, 22: Government's Opening Brief, Appendix A—p. 10.)

participated in the establishment and continued use of the KRAM procedure. (*Cf.* Finding 48: Government's Opening Brief, Appendix A, p. 17.) We have already shown that the pilots and control tower operators were not within the discretionary function exception.

It may be conceded that in a chain of military command above the operational level, the latter here typified by the pilots and control tower operators, a certain degree of discretion in the execution of orders emanating from above is called for. To put it colloquially, those executing an order from above may "fill in the details" appropriate to their particular situation. Cf. *Builders Corporation of America v. United States, supra,* 9 Cir., 320 F. 2d 425. But this reasonable leeway confers no right or power to disregard orders. See *Dalehite v. United States, supra,* 346 U.S. 15, 36: "Acts of subordinates in carrying out the operations of government *in accordance with official directions** cannot be actionable;" *Somerset Food Co. v. United States, supra,* 4 Cir., 193 F.2d 631: duty to mark wrecked ships not discretionary but *mandatory* under Wrecked Ship Act.

So here, when the Commanding General at Nellis received the promulgated AFR 55-19 (Government's Opening Brief, Appendix C-p. 1 et seq.) from the Secretary, per the Chief of Staff, he had a reasonable latitude, discretion-wise, in executing it by the rendition of his Wing Supplement-1 (Government's Opening Brief, Appendix D-p. 1 et seq.). He could interpret, he could translate it so as to suit his local con-

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*Emphasis here, as elsewhere, is supplied unless otherwise noted.

ditions, but *he could not disregard it.* Yet disregard it he did, in particulars material to the causation of the ultimate collision.

1. Disregard of AFR 55-19 at the Command Level.

The following provisions of AFR 55-19 are of interest here, with appropriate comments added:

Purpose of the regulation—to provide "guidance for commanders, pilots and air traffic control personnel for insuring *maximum safety* and efficiency in their local flying operations. (Government's Opening Brief, Appendix C-p. 1.)

* * * * *

> "2. Operational Control and Supervision. The Commander having jurisdiction over local flight operations will:
>
> * * * * *
>
> "b. Schedule local VFR flight operations in a manner which will minimize congestion and potential air collision hazards." (Government's Opening Brief, Appendix C-p. 2.)

VFR flight operation, including the KRAM simulated instrument approaches, were not so scheduled. We quote Finding 71 (Government's Opening Brief, Appendix A-pp. 22-24) which the Government does not challenge:

> "71. *The volume of highspeed Military jet traffic in the vicinity of Nellis Air Force Base, which encroached upon Victor 8 during the day time hours Monday through Friday at the time of the accident and for a period of at least six years preceding the accident, was heavy and continuous.* At the time of the accident during said day time

hours there was an arrival or departure to and from Nellis approximately every 45 seconds, *with a large part of the climbout and approach of each such arrival or departure taking place on Victor 8.*

"Approximately 200 to 250 sorties of F-100s (one sortie includes both a take-off and a landing) a day were being conducted by Nellis planes at and out of Nellis. In addition, there were other sorties flown by Nellis T-33s and C-47s and approximately 35 Military transient planes a day, landing and departing Nellis.

"At any given time during each of said days, there were approximately 50 to 60 jet aircraft from Nellis in the air. *Nellis jet aircraft averaged a crossing per minute of Victor 8.*

"The number of practice instrument jet penetrations at Nellis using radio facilities in or near Las Vegas averaged between 20 to 60 per day. There was such a jet penetration on an average of one every 15 minutes. Of such jet penetrations, 10 to 20 per day used KRAM.

"In addition to the crossings of the airways by Nellis planes, there were frequent crossings occurring regularly by jet Military planes from other airfields, including Luke, said planes sometimes flying in formation of four, with as many as five such formations, or 20 planes crossing the airways on a single mission.

In addition, Nellis planes and other Military planes engaged in low-frequency radio range orientation practice on the airway, in which student pilots flying blind under the hood, with observer

pilots, were seeking to orient themselves to the range facilities.

"A major portion of the flying herein described took place at altitudes ordinarily used by en route commercial passenger planes.

"The Nellis training area covered approximately 40,000 square miles which was bisected southwesterly to northwesterly [sic] by Victor 8. The training area was divided into areas for the conduct of the following training activities: Extended formation, close formation, transition, boom, acrobatic and flight test, Ground control intercept and instrument, flight test, air combat maneuvering, air-to-air gunnery, and air-to-ground gunnery, and air-to-ground bombing. (See Ex. G-45 and G-57.) The foregoing activities were conducted by Nellis for several years prior to April 21, 1958, and at times greatly exceeded the foregoing in volume. *Such activities constituted and created conditions which were hazardous and dangerous to the conduct of commercial flying as carried on by United Air Lines by its flight 736 on April 21, 1958."*

So, also, the District Court also found, referring to the KRAM procedure:

"47a. *The area in which said procedure was designed to be conducted was one with a very high density of both military and civilian air traffic; approximately 85% of the procedure as designed took place over and upon Victor 8 airway, the most heavily traveled airway in the Las Vegas-Nellis area, and jets practicing this pro-*

> *cedure, as the F-100F was in this instance doing, would be on this airway at substantially all of the altitudes between 25,000 and 9,500 feet."* (Government's Opening Brief, Appendix A-p. 15.)

Contrary to the assumption in the Government's Opening Brief, AFR 55-19 *was* concerned with potential hazards from collisions with *civilian* traffic. Thus Section 3a of regulation AFR 55-19A provided:

> "The commander of an airbase located in a congested area will establish VFR arrival and departure routes *to minimize conflict with traffic on civil airways,* at nearby airfields, and in local flying areas." (Government's Opening Brief, Appendix C-p. 9.)

Section 5a provided, "The *commander* will direct maximum use of *outlying facilities in order to relieve air traffic congestion near local navigational facilities.*" (Government's Opening Brief, Appendix C-p. 4; italicization of word "commander," the regulation's.)

The Court is respectfully invited to contrast this *order* with the dense Air Force use of Victor 8 civil airway as portrayed in Findings 71 and 47a quoted above.*

Nellis Command thus disregarded direct orders in making a bad situation worse on this heavily traveled commercial airway. It was mandatory, not discretion-

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*For instance, contra the required maximum use of outlying facilities, Wing Supplement 1, as promulgated by the Nellis Command, permitted, with four exceptions bearing no relationship to civilian traffic on Victor 8, instrument training "in any part of the local area"; and it also reserved the airspace within 25 miles of Nellis, thus encompassing Victor 8, for instrument flying. (Government's Opening Brief, Appendix D—pp. 1-2.)

ary, for the Nellis command to take steps to avoid congestion on the airway. Hence, in the respects given, the Nellis Command was not engaged in a discretionary function at all; nor, be it added, did it abuse its discretion, *for it had none to abuse.*

2. Disregard of AFR 55-19 at the Operational Level.

Leaving the chain of command and turning to the strictly operational level, to which the discretionary function exception does not apply in any event, we nevertheless find that, even here, AFR 55-19 was honored in the breach.

Section 5b of that regulation requires pilots conducting simulated IFR approaches at locations where there was no control tower, but only a communications station,* to contact this facility, state his intentions and request *traffic information.* And Section 5d, which the Government not only concedes but insists was here applicable, obligates the traffic control personnel to furnish such traffic information. (Government's Opening Brief, Appendix C-pp. 4-5.)

So, also, Section 7c of the regulation, under the heading "Disseminating Traffic Information," provides air traffic control personnel "will furnish pilots with *traffic advisories and other information on local conditions,* which will assist them in avoiding collisions during VFR weather conditions." (Government's Opening Brief, Appendix C-p. 6.)

The District Court found, and it is not disputed, that no traffic information on IFR traffic, including United's Flight 736, was either sought or given by the

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*Which was the situation here: see Finding 21, Government's Opening Brief, Appendix A—p. 10.

Government personnel mentioned, although the same was readily available. (Findings 21-30: Government's Opening Brief, Appendix A-pp. 10-12.)

The Government makes the unsupported contention that the above requirements as to the seeking and dissemination of traffic information have no application to *civilian* traffic information. However, as we have seen, the Air Force Regulations have express reference to "traffic on civil airways," to "air traffic congestion near local navigational facilities," and to "information on local conditions." (AFR 55-19, Sections 3a, 5a, 7c; AFR 55-19A, Section 3a: Government's Opening Brief, Appendix C-pp. 2, 4, 6, 9.)

This means that not only is the conclusion irresistible that both the pilot and the control personnel disregarded positive orders as regards the obtaining and disseminating of information as to traffic on Victor 8, but also that the District Court's findings of *negligence* in this regard, which findings we have referred to above, are unassailable.

D. The CAA and Its Operational Personnel Were Not Within the Discretionary Function Exception as Regards Their Failure to Warn United of the Hazards, Unknown to the Latter, Implicit in the Utilization of the KRAM Procedure Within Victor 8 Airway.

The CAA was primarily a regulatory body which admittedly was called upon to perform many discretionary functions and to render many discretionary decisions. We are not here, however, speaking of any of these.

We are speaking of the negligent failure of the CAA, at the strictly operational level, to warn United and its

personnel of the hazards of the KRAM procedure, known both to the CAA and of course to the Air Force, but unknown to United. (Findings 47, 57-59, 76: Government's Opening Brief, Appendix A-pp. 15-16, 19-20, 25.)

It was discretionary for the CAA to lay out Victor 8 airway and to recommend its use to the airlines. So also it was discretionary for the CAA to establish a system of granting clearances for take-offs of commercial airplanes over specified routes. But once having done this, it was proximately causative negligence at the operational level for the CAA to grant United's Flight 736 a clearance over and through Victor 8 without warning to United of the unknown, to the latter, dangers implicit in the KRAM operation over Las Vegas.

The situation is not unlike that presented by the Coast Guard lighthouse and rescue cases, headed by *Indian Towing Co. v. United States, supra,* 350 U.S. 61. The Coast Guard may, in its discretion, establish a lighthouse at a given location. But, having once done so, it must use reasonable care in its maintenance and operation. ". . . it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." 350 U.S. at 64, 65. So also, the Coast Guard may, in its discretion (and it has) set up a rescue service. This is laudable; but once again, having established such a service, it must perform that service in a careful manner at peril, in default thereof, of Government liability under the Tort Claims Act. *United States v. Lawter, supra,* 219 F.2d 559; *United States v. De Vane, supra,* 306 F.2d 182. Clearly

there was no discretion in the CAA to grant a clearance in circumstances which constituted the same a trap for the unwary, rather than a warning of danger. Cf. *Somerset Food Co. v. United States, supra,* 4 Cir. 193 F.2d 631.

Flight 736 was not *compelled* to fly Victor 8. The use of such established airways by commercial air lines was not compulsory; such use was merely advocated, albeit strongly, by the CAA, as pointed out in United's opening brief at page 24. We thus find (1) that the CAA strongly advocated the use of an airway beset by a hidden danger in the form of a semi-blindfolded, high speed maneuver without effectual separation safeguards from IFR traffic, (2) that it granted Flight 736 a clearance into and through the area of such hidden danger, and (3) that it failed to warn of such danger.

In these circumstances it is respectfully urged that there is in principle no distinction whatever between this case and the situation presented in *United States (Eastern Air Lines) v. Union Trust Co., supra,* D. C. Cir., 221 F.2d 62, where the Government tower employees granted a clearance for two airplanes to land on the same runway at the same time. In each case the act of Government operational personnel dispatched the passenger airliner into an area of danger unknown to the latter, with resultant loss of life of all on board. And in each case, since the dereliction *was* that of personnel at the operative level, the discretionary function exception, under all of the authorities which we have cited, had and has no application to save the Government from liability.

The foregoing concludes our comments as to the Government's attempt under its Points I and III to shield both the Air Force and the CAA from liability under the discretionary function exception, 28 U.S.C. 2680(a).

Under its Point IV, however, the Government also attempts to exculpate the CAA under the provisions of 28 U.S.C. § 2680(h), the so-called "misrepresentation" exception to liability under the Tort Claims Act. In this regard, as in others, the Government's claim will not bear close scrutiny.

II.

THE DISTRICT COURT DID NOT LACK JURISDICTION BY REASON OF THE "MISREPRESENTATION" EXCEPTION TO THE FEDERAL TORT CLAIMS ACT.

The District Court found and concluded that, inter alia, it had jurisdiction under 28 U.S.C. §1346(b). (Conclusion of Law IX, cf. Conclusion of Law XIX: Government's Opening Brief, Appendix A—pp. 28, 30.) Implicit in this determination is the proposition that *none* of the exceptions to the Tort Claims Act here have application. The Government now raises the "misrepresentation" exception as a bar to the District Court's jurisdiction.

Section 2680(h) of Title 28 provides in terms that the Federal Tort Claims Act and 28 U.S.C. § 1346(b) shall not apply to

> "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

As we have seen, the gist of the claim here, so far as the CAA is concerned, was the failure to warn United of a danger unknown to the latter, while at the same time granting a clearance for Flight 736 into the path of such danger. Added to this is the fact that the CAA openly encouraged all of the air lines to use Victor 8.

The right to a warning in kindred circumstances is established by such cases as *Indian Towing Co. v. United States, supra,* 350 U.S. 61 and *Somerset Food Co. v. United States, supra,* 4 Cir., 193 F.2d 631.

To analogize such a situation to a "misrepresentation" requires an elasticity of reasoning which is wholly unsupported by the sole authority—a weather report in relation to flood damage case—which the Government cites in this behalf: *National Manufacturing Co. v. United States,* 8 Cir., 210 F.2d 263. The language from that case which the Government cites at page 49 of its brief is found in the opinion prepared by Circuit Judge Woodrough which, after holding quite properly that, by statute, the Government was exempt from liability in flood damage cases in any event, then went on to liken the weather reports, upon which the plaintiffs assertedly relied, to a negligent misrepresentation within the meaning of § 2680(h). This latter thesis was not accepted by the majority of the court, Circuit Judge Johnsen writing a concurring opinion in which he was joined by Judge Sanborn, in which it was pointed out that the fundamental grounds of liability in the case were the statutory exemption of the Government for flood damage, see 33 U.S.C. § 702c, and the proposition that the dissemination or non-dissemination of public information, not of a personal character, "is

without any basis of a tort in respect of its accuracy." 210 F.2d at 279. Judge Johnsen also pointed out, in a footnote on page 280 that liability for inaccuracy in the gathering or dissemination of public information has "never been within the coverage of the [Tort Claims] Act, so that it is unnecessary to remove it on the basis of any exception." Circuit Judge Sanborn (also at page 280) expressed himself as being "in complete accord with the views expressed by Judge JOHNSEN in his concurring opinion." The result is that Judge Woodrough's remarks anent the "misrepresentation" exception was quite properly treated by the majority of the judges sitting on the case as being unnecessary to the decision; which was the fact.

So, also, it is to be noted that the *National Manufacturing Co.* case was a pre-*Indian Towing Co.,* case; and that, as earlier noted, *Indian Towing* clearly pointed out the duty of the Government, at operational levels, to warn as to known dangerous conditions.

Such being the case, it is respectfully urged that the District Court did not lack jurisdiction by reason of the asserted applicability of the "misrepresentation" exception.

This brings us to the Government's Points II, V and VI, each asserting error in the District Court's findings as to negligence on the part of the Government.

III.

THE DISTRICT COURT PROPERLY HELD THE GOVERNMENT GUILTY OF AT LEAST ACTIVE AND PROXIMATELY CAUSATIVE NEGLIGENCE.

We include the words "at least" in the above heading for the reason that on its own appeal United charges the Government with more than mere negligence; it charges the latter with wilful or reckless misconduct. (United's Opening Brief, pp. 33 *et seq.*) However, as earlier pointed out herein, it is not necessary to go into that question in resistance to the Government's appeal, since that appeal should fail in the event one or more of the District Court's findings of actual and proximately causative negligence are upheld.

A. The District Court Properly Held That the Establishment and Use of the KRAM Procedure, Culminating in the Failure of the Government Pilots to See and Avoid, and to Yield the Right of Way to, the DC-7 Were Active and Proximately Causative Negligence.

We may pass without extended discussion the Government's contentions under its Point II. It is there said in effect that the Air Force regarded KRAM as safe; that thousands of KRAM flights had been made without mishap and that the Air Force could reasonably rely upon the "see and be seen" concept.

This approach very nearly denies that the subject collision did, in fact, occur. However, it did occur and it is worthy of note that after the accident the Air Force changed its procedures to require IFR clearance and consequent effective separation between its practice instrument approaches and other IFR traffic. [20 Rep. Tr. 2600-2601.]

Furthermore, the evidence revealed quite clearly that the Government was *not* entitled to rely on the "see and be seen" concept. The Air Force knew that reliance upon visual observation (VFR) was a hazardous procedure. [15 Rep. Tr. 2010-2014.] The Air Force had known, per publications of its own Behavioral Sciences Laboratory, that a pilot's vision under VFR is not an adequate safeguard against mid-air collisions, especially at high speeds. [28 Rep. Tr. 3795-3796.] This fact was also proven independently. [21 Rep. Tr. 2855, 2863.] KRAM, however, increased even this basic inadequacy. The student pilot was in effect blindfolded; he operated under a hood so that he had no opportunty for visual observation. [F.16: R. 2533.] And the instructor pilot's opportunity in this regard was hopelessly limited by the additional duties of instructing the student pilot in the rear seat, monitoring each step of the latter's performance and monitoring the engine, navigation and other instruments of the plane; all of this being done while travelling at least 495 miles per hour and in the course of a maneuver which was designed to get from a high to a low altitude "quick," and which involved travelling 19 miles and dropping some 7,000 feet to the collision point in 2½ minutes. [FF. 16, 32, 35: R. 2533, 2537, 2538; 10 Rep. Tr. 1331.]

The crux of the matter, however, concerns the happenings immediately prior to and at the time of the collision impact itself. And this brings us to the Government's Point V wherein the findings that the Government pilots negligently failed to see and avoid, by yielding the right of way to the DC-7, are attacked.

It seems to be the Government's position that the F-100F instructor pilot saw the DC-7 about one statute mile away, the closure speed being some 735 miles per hour, and initiated evasive action which was unsuccessful. This is akin to testimony by an automobile driver that he saw the other car, but that he was driving so fast that he was unable to stop; a fair foundation for a charge of reckless driving. Cf. *Consolidated Coach Co. v. McCord,* 171 Tenn. 253, 102 S.W.2d 53; *Ziman v. Whitley,* 110 Conn. 108, 147 Atl. 370.

Be this as it may, the District Court was amply justified in finding pilot negligence on the part of the crew of the Air Force jet. It was stipulated at the trial that the Air Force pilots were bound by the Civil Air Regulations (CAR). [20 Rep. Tr. 2722.] And it is settled that the rules and regulations of the CAA have the force of law and are binding where, as here,* there are no regulations to the contrary. *United States v. Causby,* 328 U.S. 256, 258, N.2; *San Diego Gas & Electric Co. v. United States,* 9 Cir., 173 F.2d 92, 93; *Cannon v. Civil Aeronautics Board,* 7 Cir., 140 F.2d 482, 485. So also, it is settled that a violation of a valid regulation constitutes negligence *per se. San Diego Gas & Electric Co. v. United States, supra,* 9 Cir., 173 F.2d 92, 93. As was said in *Maryland Casualty Co. v. United States,* 251 U.S. 342:

> ". . . 'A regulation by a department of government addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not

*See Finding 64, Government's Opening Brief, Appendix A, p. 21. This finding is not attacked by the Government.

in conflict with express statutory provision. United States v. Grimaud, 220 U.S. 506 [31 S.Ct. 480, 55 L.Ed 563]; United States v. Birdsall, 233 U.S. 223, 231 [34 S.Ct. 512, 58 L.Ed 930]; United States v. Smull, 236 U.S. 405, 409, 411 [35 S.Ct. 349, 59 L.Ed. 641]; United States v. Morehead, 243 U.S. 607 [37 S.Ct. 458, 61 L.Ed. 926].'" (251 U.S. at 349.)

It thus becomes appropriate to point out the particulars in which the Air Force jet and its crew transgressed the Civil Air Regulations. The Regulations material here were the following:

"60.12 *Careless and reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

* * *

"60.14 *Right-of-way.* An aircraft which is obliged by the following rules to keep out of the way of another shall avoid passing over or under the other, or crossing ahead of it, unless passing well clear.

"Note: * * * The aircraft which has the right-of-way will normally maintain its course and speed, but nothing in this part relieves the pilot from the responsibility for taking such action as will best aid to avert collision.

"(b) Converging * * * When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other, which is on its right. * * *

"60.15 *Proximity of aircraft.* No persons shall operate an aircraft in such proximity to another aircraft as to create a collision hazard." [55 Rep. Tr. 7331-7332.]

It is not disputed that the jet approached the DC-7 from above and from the left of the latter. (Findings 36, 38, 39, 40: Government's Opening Brief, Appendix A—p. 14; these findings are not attacked.) So also, it is not disputed that the jet was flying at a speed of 495 miles per hour or more, that the two planes did in fact collide, that the weather was clear, that the visibility, at least so far as the jet was concerned, was unlimited, and that, according to the Government, the jet was unable to avoid the DC-7 by last minute evasive action. (Findings 35, 18, 9, none of which is attacked: Government's Opening Brief, Appendix A—pp. 13, 9, 4-5.) In these circumstances the District Court was fully justified in finding and concluding that the acts and omissions of the crew of the jet constituted, at the very least, negligence per se and a violation* of each of the Civil Air Regulations above set forth; from which it follows that the Government's Point V, like the other points made by it, is devoid of merit. This brings us to the Government's Point VI, relative to the speed brakes.

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*Also a violation of Nev. R.S. § 493.130, which, like CAR 60.12, prohibits the operation of aircraft in a careless or reckless manner so as to endanger the life or property of others.

B. The District Court Properly Found That the Retracted Condition of the Speed Brakes Constituted Proximately Causative Negligence.

In this regard the District Court Found:

> "37. At the time of the impact the F-100F's speed brakes were retracted. In the exercise of ordinary care said brakes should have been extended." (Government's Opening Brief, Appendix A—p. 14.)

The Government states (Brief, p. 52) that the above finding is based entirely upon the evidentiary fact that the brakes were found in the debris in a retracted position. And it suggests, as a matter of pure speculation that the brakes *might* have been retracted as a part of an evasive maneuver or that they *might* have been retracted *after* the collision as a matter of reducing (?) the rate of descent.

There was, of course, no direct evidence as to *when* the brakes were retracted. The burden of going forward with evidence as to the time of retraction necessarily passed to the Government after it was proven that the brakes were found retracted in the debris of the jet. In the circumstances, the Government could not meet this burden, with the result that the District Court was called upon to draw an inference based upon the proven fact of retraction of the brakes as found upon the ground. It did this; and the inference which it drew is a reasonable one. It is a truism, as pointed out by Mr. Justice Jackson in his dissent in the *Dalehite* case, 346 U.S. at 55, that "There was no error in adopting one of two permissible inferences . . .," in that case, as to the fire's origin. The trier of fact is at liberty to draw reasonable inferences from the

proven facts; and when it does, its finding may not be said to be without support, or to be clearly erroneous. Cf. *Glasser v. United States,* 315 U.S. 60, 80.

It is respectfully urged that the Government's Point VI is without merit.

IV.

THE GOVERNMENT HAS FAILED TO SHOW ERROR IN THE DISTRICT COURT'S ALLOWANCE OF CONTRIBUTION TO IT FROM UNITED IN AMOUNTS NOT IN EXCESS OF THE JURY VERDICTS AGAINST THE LATTER IN THE WIENER, WEIL AND TRUJILLO CASES.

It will be recalled that United, on its own appeal, urges that the District Court erred in allowing the Government any sums whatever by way of contribution from United; and that United should have received indemnity, which is to say total contribution, from the Government as regards all damages recovered by the passenger-plaintiffs from United.

The Government counters by asserting that the District Court erred in the cases mentioned above in limiting its right to contribution from United to amounts not in excess of the jury verdicts against United in those cases. In the *Wiener* case, the verdict against United was for an amount substantially less than the amount of recovery from the Government allowed such plaintiffs by the Court. In fact, it was for less than one-half of the amount allowed the plaintiff as against the Government; in round figures, $46,000 as against United and $128,000 as against the Government.

In a nutshell, the Government's position is that it is entitled to contribution from United in *Wiener* in an amount equal to one-half of the judgment against it,

or $64,000, even though such one-half exceeds by some $18,000 the total amount of the judgment entered on the verdict against United in that case. The Government cites no authority in support of its position, which is not surprising, since the books do not abound with decisions dealing with contribution as between concurrent tortfeasors where the recoveries by a given plaintiff differ as to amount. See, however, *D.C. Transit Co. v. Slingland,* D.C. Cir., 266 F.2d 465, discussed below.

It is necessary, therefore, to have recourse to basic principles in the law of contribution, which recourse will demonstrate that the Government was allowed, in the subject cases, more than in equity and good conscience it was entitled to.

It is hornbook law that the right to contribution arises where one party to an obligation common to himself and another pays more than his share thereof in satisfaction of the debt. Cf. Cal.Civ. Code § 1432; Cal.Code Civ. Proc. § 875. And the question here is, what, in the *Wiener* case, is the joint or common obligation as between the Government and United in that case? In round figures, the court judgment against the Government was $128,000; the judgment on the verdict against United was $46,000. In a word, both parties, by judgment were obligated alike, jointly or in common, to the plaintiff in the sum of $46,000. The excess over that sum of the judgment against the Government—$82,000—was not an obligation common to

the Government and to United. It was a several obligation, over and above the common obligation of $46,000 owed by both parties, which was owed by the Government, severally and alone, *and as to which the Government was not entitled to contribution on any theory.* Contribution as to the common obligation—$46,000—would have resulted in United's share, assuming payment of the judgment against the Government, being fixed, again in round numbers, at $23,000. Instead, United's contributory share was actually fixed at the full amount of the obligation common to both parties: $46,000. The Government thus was awarded exactly twice the amount to which it was entitled under ordinary principles of contribution.

As earlier indicated, we have found but one case dealing with a similar problem: *D.C. Transit Co. v. Slingland,* D. C.Cir., 266 F.2d 465. And even under the formula expressed by the court in that case, the Government received more from the District Court than it was entitled to. There the judgment against the Transit Company was for $15,000; that against the Government, for $10,000. The court held that should the plaintiffs resort only to the judgment against the Government, the parties should each contribute one-half of the *common liability*: $10,000. This is in accord with what has been said above. The court then went on to say that if, as would be more likely, the plaintiffs should obtain payment of the Transit Company judgment, $15,000, a fair and equitable solution would be to require each party to pay that percentage

of the judgment against it which the larger of the two judgments (there $15,000, here $128,000) bore to the sum of both judgments (there $25,000, here, again in round numbers, $174,000) which in the *Slingland* case was 60% and here would be (128,000 divided by 174,-000) some 73½%. In other words, the *Slingland* formula, applied here, would result as follows, in the event the Government paid the full judgment against it:

United would contribute roughly 73½% of the $46,000 judgment against it, rounded out at $34,000.

The Government would pay, net, giving credit for the above United contribution, 73½% of the $128,000 judgment, rounded out at $94,000.

The plaintiff would thus recover her larger judgment of $128,000 made up of $94,000 net from the Government, including some $34,000 contributed by United.

It thus appears that under either hypothesis, contribution upon a one-half of the common liability basis or contribution upon the *Slingland* formula basis, the Government certainly is in no position to complain of the $46,000 contribution award from United which the District Court gave it in the *Wiener* case, and, above all, it has certainly failed to show error in that regard.

As for the *Weil* and *Trujillo* cases, if we understand the Government aright, it complains of cross-allowances of $156.62. Clearly this is *de minimis,* besides being correct in any event from the standpoint of contribution.

Conclusion.

It is respectfully urged that the Government has failed to show error and that the judgments against it and in favor of United should stand, subject to the outcome of United's own appeals.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

PIERCE WORKS